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THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      JULY 20, 00

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Reynolds Metal Company  
v.  
Wilkinson Manufacturing Company

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Opposition No. 98,123  
to application Serial No. 74/581,682  
filed on October 3, 1994

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Alfred J. Mangels for Reynolds Metal Company.

Jill R. Ackerman and D. Nick Caporale of Baird, Holm,  
McEachen, Pedersen, Hamann & Strasheim for Wilkinson  
Manufacturing Company.

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Before Hairston, Walters and Holtzman, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Wilkinson  
Manufacturing Company (Wilkinson) to register the mark  
DELTAPAK for "oriented polystyrene containers with a tamper-  
resistant locking device used for food."<sup>1</sup>

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<sup>1</sup> Serial No. 74/581,682, filed October 3, 1994, which alleges a  
bona fide intention to use the mark in commerce.

Registration has been opposed by Reynolds Metal Company (Reynolds) under Section 2(d) of the Trademark Act on the ground that Wilkinson's mark, when used in connection with the identified goods, so resembles Reynolds' previously registered and used mark DEL-PAK for "plastic containers and plastic lids therefor for use in foodservice operations,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.

Wilkinson, in its answer, denied the salient allegations of the opposition and asserted a counterclaim under Section 18 of the Trademark Act to restrict the identification of goods in Reynolds' registration. The counterclaim, as now amended, is a contingent one and seeks to limit the goods in Reynolds' registration to "polypropylene and polyethylene containers and lids therefor for use in food service operations," i.e., to replace the references to "plastic" in the current identification of goods with references to "polypropylene and polyethylene."

Reynolds has filed an answer to the amended counterclaim wherein it admits that it uses the DEL-PAK mark only in connection with polypropylene and polyethylene containers and lids. However, Reynolds asserts that the restriction which Wilkinson seeks is not commercially significant in that its entry would not avoid a likelihood of confusion.

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<sup>2</sup> Registration No. 1,564,584 issued November 7, 1989; Sections 8

We turn first to the evidentiary disputes that have arisen between the parties. As regards Reynolds' objection to certain of the testimony of Wilkinson's witness Raymond Salinas, on the ground that Wilkinson failed to adequately qualify Mr. Salinas, we note that Reynolds did not raise this objection during the course of Mr. Salinas' testimony deposition. Inasmuch as this ground of objection may have been obviated during Mr. Salinas' testimony deposition, (i.e., Wilkinson may have offered more information about his background), we find that Reynolds has waived this objection. See Fed. R. Civ. P. 32(d)(3)(A). In any event, it appears to us that sufficient information was offered concerning Mr. Salinas' background that he was competent to testify to the matters in question.

Reynolds also has objected to Wilkinson's exhibit no. 52, which contains information concerning Wilkinson's sales, on the ground that such information is not relevant because Wilkinson's application is based on a bona fide intention to use the mark in commerce. Notwithstanding that the application is an intent-to-use application, where as here, the applicant has begun use of its mark, information concerning sales is relevant because it may show whether there has been an opportunity for actual confusion to occur.

In view thereof, Reynolds objection to Wilkinson's exhibit no. 52 is not well taken.

Finally, after the filing of briefs herein, Reynolds filed a motion to supplement the record with a copy of U.S. Patent No. 5,507,406 which covers a "Tamperproof/Tamper-evident Container." In the alternative, Reynolds requests that we take judicial notice of the patent. Reynolds maintains that information in the patent contraverts certain arguments made by Wilkinson in its brief. Wilkinson, on the other hand, argues that Reynolds' motion to supplement the record is untimely. Inasmuch as Reynolds' time for taking testimony has closed, it will not now be allowed to supplement the record. Moreover, the Board does not take judicial notice of patents. We should point out, however, that arguments made in a brief, unless supported by properly filed evidence, are entitled to no weight.

The record consists of the pleadings; the files of the involved application and registration; and testimony depositions, with exhibits, filed by both parties. Reynolds submitted by way of notice of reliance a status and title copy of it's pleaded registration; dictionary excerpts; and Wilkinson's responses to certain discovery requests. Wilkinson submitted by way of notice of reliance a dictionary excerpt; Reynolds' responses to certain of

Wilkinson's discovery requests; and the affidavit of Armel MacDonald.<sup>3</sup>

According to the record, Reynolds first used the mark DEL-PAK in connection with plastic containers and plastic lids therefor for foodservice operations in January 1989. Reynolds' containers range in size from 8 oz. capacity to 54 oz. capacity. Reynolds' containers and lids are made from polypropylene and polyethylene which are transparent plastic materials. The products are also available in opaque form in which the plastic contains a coloring material.

Reynolds products are promoted and sold to customers in the restaurant, hotel, supermarket and related foodservice industry. Reynolds sells its products through distributors. Between 1989 and 1995 Reynolds' sales totaled approximately \$60,000,000. The average selling price for a case of DEL-PAK containers or lids is around \$20.00, and 500 units are in each case.

Reynolds spends hundreds of thousands of dollars annually in advertising and promoting its products. It distributes product catalogs and flyers to distributors, and places advertisements in trade publications.

Although an intent-to-use application, the record shows that Wilkinson began using the mark DELTAPAK for an oriented polystyrene (plastic) food container in February 1995.

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<sup>3</sup> The parties agreed to the submission of this affidavit in lieu

Wilkinson's product features a one-step tamper-evident locking device which prevents anyone from opening the lid and tampering with the contents of the container.

According to Mr. Salinas, Wilkinson considered a number of marks in connection with its product, but decided on DELTAPAK because "Delta Project" was the in-house name used to identify Wilkinson's project for developing the containers.

Wilkinson's products are sold nationwide to warehouse clubs such as Price-Costco, Sam's Club, foodservice distributors and large supermarket chains. Wilkinson's products are promoted for displaying foods with limited shelf life such as cookies, candy and doughnuts. The containers range in size from 8 oz. capacity to 128 oz. capacity. Approximately \$6,000,000.00 worth of DELTAPAK containers were sold between February 1995 and October 1999.

As indicated above, Reynolds made of record a status and title copy of its registration for the mark DEL-PAK. Thus, there is no issue with respect to Reynolds' priority. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

We turn then to the issue of likelihood of confusion.

Turning first to a consideration of the marks, we find that they are substantially similar in sound, appearance and

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of a testimony deposition.

commercial impression; the only difference between the marks being the additional letters "TA" in Wilkinson's mark. We recognize that Reynolds admitted that it selected the mark DEL-PAK because it was suggestive of the idea of a "deli" or delicatessen. In view of this admission, Wilkinson argues that DEL-PAK and DELTAPAK have different connotations. However, there is no evidence in the record that in the foodservice industry DEL means or suggests "deli" or delicatessen," such that DEL-PAK and DELTAPAK would have different connotations to purchasers of the involved goods. The only evidence we have in the record with respect to the meaning of DEL are three dictionary excerpts which show that DEL, inter alia, is short for "delta."<sup>4</sup> While we cannot say that it is generally known that DEL is short for "delta," to those purchasers who are aware of this, the marks would have identical connotations. In finding that the respective marks herein are substantially similar, we have kept in mind the normal fallibility of human memory over time and the fact that the average purchaser retains a general rather than a specific impression of trademarks encountered in the marketplace. Because of the similarities between the marks herein, the question then is whether the goods are related

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<sup>4</sup> These excerpts were taken from Webster's Third New International Dictionary (1986); Random House Unabridged Dictionary (2 ed. 1993); and Random House Webster's College Dictionary (1995).

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such that when sold under the respective marks, confusion is likely.

We must consider first the goods as set forth in Wilkinson's application and Reynolds' registration. Wilkinson's goods are set forth as "oriented polystyrene

containers with tamper-evident locking device used for food" and Reynolds's goods are set forth as "plastic containers and plastic lids therefor for use in foodservice operations." Wilkinson argues that its goods are different from those of Reynolds' because of the tamper-evident locking device. However, in determining whether goods are related for purposes of likelihood of confusion, it is not a question of whether the goods have identical features or are identical in appearance. Rather, it is the underlying nature of the goods and their use or purpose that must be considered. The identification of goods in both Wilkinson's application and Reynolds' registration indicate that the goods of both parties are plastic containers and lids for use with foods, in particular, for food packaging. Also, because neither the application nor the cited registration contains any limitations as to channels of trade or classes of purchasers, we must presume, for purposes herein, that the parties sell their goods in all of the usual trade channels for plastic containers and lids for foods, to all of the normal classes of customers. Accordingly, we can draw no legal distinction between the parties' goods, trade channels, and classes of customers, but rather must consider them to be the same. In point of fact, we note that both parties sell their goods to food service distributors and supermarkets.

With respect to the classes of purchasers of these goods, we should note that although some of the purchasers of the involved goods may well be sophisticated, others may not be particularly knowledgeable. Both parties' goods could be sold to neighborhood bakeries, "mom and pop" stores, and small delicatessens and cafes. The owners of these types of establishments would not be considered sophisticated purchasers.

Further, as to the lack of evidence of any known instances of actual confusion, it must be remembered that evidence of actual confusion is hard to come by and the test under Section 2(d) of the Trademark Act is not actual confusion but likelihood of confusion.

In view of the foregoing, we conclude that purchasers familiar with Reynolds' plastic containers and lids for food use sold under the mark DELPAK would be likely to believe, upon encountering Wilkinson's mark DELTA-PAK for oriented polystyrene containers with a tamper-resistant locking device also for food use, that the goods originate with the same source.

Finally, we turn to Wilkinson's counterclaim to restrict Reynolds' registration to "polypropylene and polyethylene containers and lids therefor for use in food service operations." In this case, we agree with Reynolds that this restriction, which relates only to the specific

plastic materials used in manufacturing its containers and lids, would not avoid the likelihood of confusion. There is no evidence that polyethylene and polypropylene, on the one hand, and oriented polystyrene, on the other hand, are sufficiently different kinds of plastics such that they would be likely to emanate from distinct sources. Neither is there evidence that the relevant purchasers of the types of containers involved herein would be aware that polyethylene and polypropylene, and oriented polystyrene are specifically different kinds of plastic or that these plastics are likely to emanate from distinct sources. In view thereof, and because the proposed restriction does not relate to the use or purpose of the goods, the channels of trade, or the purchasers, it is not a commercially significant restriction. In short, the actual market conditions would be the same even with the restriction to Reynolds' identification of goods.

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**Decision:** The opposition is sustained and the counterclaim is dismissed.

P. T. Hairston

C. E. Walters

T. E. Holtzman  
Administrative Trademark Judges  
Trademark Trial and Appeal Board